IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-44

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SUPREME COURT, U.S.

ROBERT BURRELL, Petitioner,

v.

MILTON McCRAY, Respondent.

SERGEANT V.D. SMITH, Etc., Petitioner,

v.

MILTON McCRAY, Respondent.

GERALD McCLELLAN, ET AL., Petitioners,

v.

JAMES E.X. STOKES, Respondent.

DR. HAROLD M. BOSLOW AND
DR. DOMINGO C. SORONGON, Petitioners,

v.

JOHN WASHINGTON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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August 27, 1975.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) (en banc).

QUESTIONS PRESENTED FOR REVIEW

I. Whether a Maryland prisoner who alleges violations of his constitutional rights arising out of his imprisonment may be

required to exhaust state administrative remedies before being permitted to proceed in federal court under 42 U.S.C. § 1983.

II. Whether the Eighth and Fourteenth Amendment rights of Respondent McCray were violated by Petitioners Burrell and Smith when they subjected McCray to isolation in a "strip cell" under severe and harsh conditions of confinement for a period of two days.

STATEMENT OF THE CASES

A. Burrell v. McCray and Smith v. McCray

On January 19, 1972, Milton McCray, a state prisoner at the Maryland Penitentiary in Baltimore, filed a pro se complaint in the United States District Court for the District of Maryland under 42 U.S.C. § 1983 claiming that his constitutional rights had been violated by a prison guard, Robert Burrell, when he, McCray, was locked in an isolation cell and subjected to inhumane conditions of confinement. On February 9, 1972, McCray filed a supplemental pro se pleading.

On March 7, 1972, McCray filed another pro se civil rights complaint against Bernard D. Smith, alleging that Smith, a guard at the Penitentiary, had subjected McCray to a deprivation of his constitutional rights by arbitrarily confining McCray in an isolation cell under excessively harsh conditions. The complaint against Smith was unrelated to the complaint McCray had previously filed against Burrell.

Counsel was appointed to represent McCray in both cases on about March 16, 1972, and by agreement of all counsel and the District Court, the cases were consolidated. The defendants below filed, through counsel, on May 1, 1972, a joint motion to dismiss each case, principally on the ground that McCray had failed to exhaust an available state administrative remedy by not petitioning the Maryland Inmate Grievance Commission for relief

before filing his complaints in federal court.

On June 11, 1973, the defendants' motion to dismiss was heard before the Honorable Edward S. Northrop. The parties submitted evidence concerning the adequacy of the Inmate Grievance Commission as a state administrative remedy for the purpose of exhaustion, and the Court heard legal argument on the question of whether exhaustion could be required in a § 1983 action under the circumstances presented by these cases. At the conclusion of the hearing on the defendants' motion, the Court proceeded, on June 12, 1973, to hear the merits of McCray's claims. Testimony was presented over a three-day period.

On October 16, 1973, the Court issued an opinion and order denying defendants' motion to dismiss and denying McCray's claims for relief. In an order filed November 2, 1973, the Court amended its opinion and original order by granting the defendants' motion to dismiss and denying McCray's claims for relief. Judgments were entered accordingly on November 5, 1973. The opinion of the District Court is reported as McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973).

McCray appealed to the United States Court of Appeals for the Fourth Circuit which reached the merits of the cases and reversed the judgments of the District Court. McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) (en banc). The Court of Appeals held that McCray's Eighth Amendment rights were violated by Burrell and Smith and remanded the cases for further proceedings to determine if McCray is entitled to damages and injunctive relief or if Burrell and Smith may avail themselves of a qualified immunity and good faith defense.

On April 25, 1974, the Court of Appeals had consolidated McCray's appeals with the appeal of Respondent James E.X. Stokes. See, infra. Briefs were filed in the McCray and Stokes cases, and they were argued on June 6, 1974. Subsequently, on June 27, 1974, without the Court having issued a decision, the McCray and

Stokes cases were consolidated with the case of Respondent Washington, see, infra, for en banc consideration by the Court of Appeals.

B. Boslow and Sorongon v. Washington

On October 16, 1973, John Washington, a Maryland state prisoner at the Patuxent Institution in Jessup, filed a pro se complaint in the United States District Court for the District of Maryland under 42 U.S.C. § 1983 claiming that he suffered injuries and deprivations of his constitutional rights as a result of the failure of Respondent Sorongon, a prison doctor, and Respondent Boslow, the Director of Patuxent Institution, to provide Washington with necessary medical care. Washington sought declaratory relief and an award of compensatory and punitive damages. He demanded a trial by jury.

The defendants below filed a motion to dismiss Washington's complaint on the sole ground that he had failed to exhaust state administrative remedies by presenting his claim to the Maryland Inmate Grievance Commission. The defendants relied exclusively on the previous decision by the Honorable Edward S. Northrop in McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973).

Counsel was appointed to represent Washington, and on April 4, 1974, a hearing was held before the District Court on the defendants' motion to dismiss. The parties submitted evidence concerning the adequacy of the Inmate Grievance Commission as a state administrative remedy for the purpose of exhaustion (including portions of the record from McCray v. Burrell, supra), and the Court heard argument by counsel.

On May 17, 1974, Chief Judge Northrop issued an opinion and order granting the defendants' motion to dismiss. The opinion was subsequently amended on May 22, 1974. Judgment was entered accordingly on May 20, 1974, and Washington made a timely appeal.

The opinion of the District Court is reported as Washington v. Boslow, 375 F. Supp. 1298 (D. Md. 1974).

Washington appealed to the United States Court of Appeals for the Fourth Circuit which reversed the judgment of the District Court and remanded the case for a determination on the merits.

C. McClellan v. Stokes

On December 4, 1973, James E.X. Stokes, a state prisoner at the Maryland Penitentiary in Baltimore, filed a pro se civil rights complaint in the United States District Court for the District of Maryland alleging that Petitioner McClellan and other prison officials violated his First and Fourteenth Amendment rights by denying him permission to receive and read two national political newspapers, the "Gay Liberator" and "Akwesasne Notes." On December 17, 1973, Stokes filed a supplemental pro se pleading.

The defendants below moved that Stokes' complaint be dismissed for failure to exhaust state administrative remedies on the authority of McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973). On April 1, 1974, the District Court granted the defendants' motion and ordered that Stokes' complaint be dismissed without prejudice to institute a further action after having unsuccessfully petitioned the Maryland Inmate Grievance Commission for relief. Judgment was entered accordingly on April 1, 1974.

Stokes appealed to the United States Court of Appeals for the Fourth Circuit which reversed the judgment of the District Court and remanded the case for a determination on the merits. McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975).

ARGUMENT

I. THE DECISIONS BELOW IN BOSLOW V. WASHINGTON AND McCLELLAN V. STOKES ARE CLEARLY CORRECT.

A. Boslow v. Washington

Petitioners Boslow and Sorongon are requesting this Court to decide whether a Maryland prisoner who alleges violations of

his constitutional rights arising out of the failure of prison officials to afford him necessary medical care may be required to exhaust state administrative remedies before being permitted to proceed in federal court under 42 U.S.C. § 1983. The Court should not grant certiorari, however, because the decision below was correct on grounds other than the issue being raised by the petitioners. Even assuming that the question presented is of sufficient importance to warrant review by this Court,[1] the case may be decided on narrower grounds, and the Court would not reach the important question.

The state administrative remedy of which Petitioners claim Washington must avail himself before being permitted to proceed under the Civil Rights Act in federal court is the Maryland Inmate Grievance Commission. Washington, however, sought only damages as relief, Washington v. Boslow, 375 F. Supp. 1298, 1299 (D. Md. 1974), and by Petitioners' own admission, Petition for a Writ of Certiorari, page 14, the Maryland Inmate Grievance Commission does not have the power to award either compensatory or punitive money damages. See also, McCray v. Burrell, 516 F.2d 357, 365 (4th Cir. 1975); Washington v. Boslow, supra at 1300.

A state administrative remedy is deemed to be inadequate, and hence not subject to the exhaustion requirement, when the agency is not empowered to grant effective relief. Gibson v. Berryhill, 411 U.S. 564 n.14 (1973). In addition, this Court has unequivocally held that "a damage action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies." Preiser v. Rodriguez, 411 U.S. 475, 494 (1973). See also, Ray v. Fritz, 468 F.2d 586, 587 (2nd Cir. 1972); Jones v. Decker, 436 F.2d 954 (5th Cir. 1970).

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1 See, the argument in part I(B), infra.

B. McClellan v. Stokes

In a series of opinions since Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court has established the rule that the exhaustion of state administrative remedies is unnecessary in a civil rights action. The remedy available under 42 U.S.C. § 1983 is supplementary to any state remedies. Federal jurisdiction may be invoked without the exhaustion of either available or effective state administrative remedies.

> We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy. We stated in Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492:
>
> > "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." McNeese v. Board of Education, 373 U.S. 668, 671, 83 S.Ct. 1433, 1435 (1963).

In McNeese, the specific holding of the Court was that the purposes of 42 U.S.C. § 1983 would be defeated "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." 373 U.S. at 672, 83 S.Ct. at 1436. In Damico v. California, 389 U.S. 416, 88 S.Ct. 526 (1967) (per curiam), however, the Court interpreted McNeese to include the principle that

> "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy." (brackets in original). 389 U.S. at 417, 88 S.Ct. at 526.

See also, Carter v. Stanton, 405 U.S. 669, 92 S.Ct. 1232 (1972); Metcalf v. Swank, 406 U.S. 914, 92 S.Ct. 1778 (1972).

It may be argued that the holding in McNeese, standing by itself, did not fully resolve the question of whether there

are circumstances where the exhaustion of state administrative remedies may be required in a § 1983 proceeding since the Court appeared to qualify its holding by adding that

> [m]oreover, it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights. 373 U.S. at 674-75, 92 S.Ct. at 1437.

In Damico, however, the three-judge District Court whose decision was reversed by the Supreme Court had found that the plaintiffs had "'failed to exhaust adequate administrative remedies.'" (emphasis added). 389 U.S. at 417, 88 S.Ct. at 52[illegible].[2]

The next occasion on which the Supreme Court considered the question of whether exhaustion of state remedies may be required in a § 1983 action was in a case brought by a Pennsylvania state prisoner who alleged that prison officials had violated his constitutional rights by confiscating his legal papers and materials. The Court reviewed the nature of the state administrative remedy and held that

> [i]n light of this it seems likely that to require petitioner to appeal to the Deputy Commissioner of Correction, the Commissioner, or to the Attorney General would be to demand a futile act. In any event, resort to these remedies is unnecessary in light of our decisions in Monroe v. Pape; McNeese v. Board of Education; and Damico v. California. (full citations omitted). Houghton v. Shafer, 392 U.S. 639, 640-41, 88 S.Ct. 2119, 2120 (1968) (per curiam).

As in McNeese, where the Court appeared to qualify its decision by finding that the state remedy was inadequate, the Court in Houghton, while holding that resort to state administrative remedies was unnecessary, also found that the exhaustion

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2 The dissenting opinion of Mr. Justice Harlan in Damico confirms that there was an adequate state administrative remedy available to the plaintiffs. The majority of the Court, however, held that exhaustion of that remedy was unnecessary.

of state remedies under the circumstances there would be an exercise in futility. In Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407 (1971) (per curiam), however, this Court foreclosed the possibility that its prior holdings could be interpreted to mean that the remedy provided by the Civil Rights Act is supplementary to a state administrative remedy only if the state remedy is not available and effective.

Wilwording v. Swenson was a case brought under § 1983 by state prisoners challenging prison conditions and disciplinary measures taken against them while confined in maximum security. The Court reaffirmed Monroe v. Pape, McNeese v. Board of Education and Damico v. California and cited them for the proposition that the remedy provided by the Civil Rights Act "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Furthermore, the Court held that

> [s]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319 (1968). There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such administrative appeals was noted, we held that in "any event, resort to these remedies is unnecessary." (citation omitted). 404 U.S. at 252, 92 S.Ct. at 409.

The most recent decisions of the Supreme Court specifically approve the holdings of the earlier cases that the exhaustion of state administrative remedies may not be required in an action brought under § 1983. Mr. Justice White delivered the opinion of the Court in Gibson v. Berryhill, 411 U.S. 564, 574-75, 93 S.Ct. 1689, 1695-96 (1973):

> .... this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C., § 1983. McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967).

In Steffel v. Thompson, 415 U.S. 452, 472-73, 94 S.Ct. (1974)
1209, 1222/,Mr. Justice Brennan wrote for the Court:

> When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) -- as they are here -- we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. See, e.g., McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

The decision in Steffel v. Thompson, supra, was explained by Mr. Justice Blackmun writing for the Court in Ellis v. Dyson, __U.S.__, 95 S.Ct. 1691, 1695 (1975):

> Exhaustion of state judicial or administrative remedies in Steffel was ruled not to be necessary, for we have long held that an action under § 1983 is free of that requirement. (citations omitted).

Petitioners suggest that the decision in Huffman v. Pursue, 420 U.S. 592, 95 S.Ct. 1200 (1975), which concerned an application of the principles of Younger v. Harris, 401 U.S. 37 (1971), indicates that there may be circumstances under which this Court would depart from the long-established principle that exhaustion of state administrative remedies may not be required in a § 1983 action; however, in footnote 21, Mr. Justice Rehnquist stated that "[b]y requiring exhaustion of state appellate remedies for the purposes of applying Younger, we in no way undermine Monroe v. Pape (citation omitted)."

Any doubt that the exhaustion of any state administrative or judicial remedies may/be not required before the federal courts exercise jurisdiction in a prisoner civil rights action was dispelled by this Court in Preiser v. Rodriguez, supra, where it was held that the sole federal remedy for a prisoner who challenges the fact or duration of his physical confinement and who requests his immediate or more speedy release is a writ of habeas corpus.

Significantly, and as Mr. Justice Brennan pointed out in his dissenting opinion,

> "the court does not graft the habeas corpus exhaustion requirement onto prisoner actions under the Ku Klux Klan Act, but it reaches what is functionally the same result by holding that the District Court's jurisdiction under the Act is in some instances displaced by the habeas corpus remedy. Henceforth, in such cases a prisoner brings an action in the nature of habeas corpus -- or he brings no federal court action at all." 411 U.S. at 503, 93 S.Ct. at 1843. See also, Id. at n.10.

Preiser v. Rodriguez is equally important for what it did not decide. The Court specifically rejected the State of New York's expansive claim that all prisoner complaints must be treated by the federal courts as habeas corpus petitions with the attendant exhaustion requirements. See, Brief for Respondents in Preiser v. Rodriguez, supra, page 9, n.2. The Court noted that there are circumstances where habeas corpus may be an alternative remedy to a proper action under § 1983, but it refused to hold that any action which may properly be brought under habeas corpus must be brought under habeas corpus. Instead, the Court reaffirmed its view that

> a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life but not to the fact or length of his custody. 411 U.S. at 499, 93 S.Ct. at 1841.

See also, Humphrey v. Cady, 405 U.S. 504, 516-17 n.18 (1972).

The substantial and uniform series of decisions by this Court since Monroe v. Pape establish the rule that in an action brought under the Civil Rights Act of 1871 (42 U.S.C. § 1983), the plaintiff may not be required to exhaust state remedies before being permitted to proceed in federal court. The plaintiff need not exhaust a state administrative remedy even where the remedy is available and adequate. "State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." Wilwording v. Swenson, 404 U.S. at 252, 92 S.Ct. at 409.

This Court has often recognized the unique role of the Civil Rights Acts. See, Zwickler v. Koota, 389 U.S. 241, 245-249 (1967); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415 (1964); Monroe v. Pape, 365 U.S. 167, 180 (1961); Mitchum v. Foster, 407 U.S. 225, 242 (1972); District of Columbia v. Carter, 409 U.S. 418 (1973). Generally, Chevigny, Section 1983 Jurisdiction: A Reply, 83 Harv. L. Rev. 1352, 1356-58 (1970). There are strong policy considerations which underlie this Court's determination that exhaustion of state remedies is not a prerequisite to proceeding in federal court in actions properly brought under 42 U.S.C. § 1983:

> "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." [Stapleton v. Mitchell, 60 F. Supp. 51, 55 (D. Kan. 1945)]. McNeese v. Board of Education, 373 U.S. at 674 n.6, 83 S.Ct. at 1437.

The decision below, a unanimous decision by the Court of Appeals en banc, is based upon settled law and is clearly correct. See also, Jones v. Metzger, 456 F.2d 854, 856 (6th Cir. 1972); Beale v. Blount, 461 F.2d 1133, 1139 n.11 (5th Cir. 1972); Shelton v. Union County Board of Commissioners, 483 F.2d 1406, 2 Prison L. Rptr 578 (7th Cir. 1973) (unpublished per curiam opinion); Brooks v. Center Township, 485 F.2d 383, 386 (7th Cir. 1973); McClelland v. Sigler, 456 F.2d 1266, 1267 (8th Cir. 1972); Raper v. Lucey, 488 F.2d 748, 751 n.3 (1st Cir. 1973); Conover v. Montemuro, 477 F.2d 1073, 1079 (3rd Cir. 1973); Padilla v. Ackerman, 460 F.2d 477, 479 (9th Cir. 1972); LeVier v. Woodson, 443 F.2d 360, 361 (10th Cir. 1971); Blair v. Rockefeller, 469 F.2d 641, 642 (2nd Cir. 1972).

In support of their argument that the Court should grant certiorari in this case, Petitioners claim that the decision below "undermines the various reform measures that the states have undertaken to date," Petition for Writ of Certiorari, page 22, and that it "would effectively stifle hopes of future programs to ameliorate prisoner grievances through state mechanisms." Id. These claims are wholly unsupportable and do not render the issue presented of sufficient importance to warrant this Court's review. The Court has recently denied certiorari in a case which appears to have raised the same issue. Twomey v. Wright, __U.S.__, 43 L.W. 3525, 3528, 3530 (3/24/75).

The recent proliferation of prisoner grievance mechanisms in the various state prison systems has occurred despite the settled law which precludes an exhaustion requirement for prisoners in cases properly brought under § 1983. See, "Prison Grievance Procedures: A National Survey of Programs Underway," Corrections Magazine, January/February, 1975. Grievance procedures, such as the Maryland Inmate Grievance Commission, have developed because state prison officials perceive the need for such mechanisms in the proper administration of their prison systems. Petitioners offer no empirical support for their claim that the decision below will in any way adversely affect the progress which is being made in this area.

In fact, it would appear that the no-exhaustion rule in § 1983 cases has a beneficial effect on the development of grievance procedures. The availability of federal court relief for prisoners is an incentive for the states to provide grievance procedures which act promptly and fairly. If a state grievance mechanism is visible and has simple, workable procedures, and if prisoners believe that they will have a fair opportunity to present their claims to an agency which will provide relief

where appropriate in a reasonable period of time, many potential pro se litigants in federal court would avail themselves voluntarily of such a procedure rather than engage in difficult and protracted litigation.

If prison systems become capable of internally resolving many prisoner grievances, there will be less litigation in the federal courts. Grievance procedures, such as the Maryland Inmate Grievance Commission, therefore, will serve to reduce the number of prisoner civil rights complaints without this Court taking the drastic and unprecedented action of holding that a civil rights action may be dismissed for failure to exhaust state remedies.[3]

In one of the earliest prisoner civil rights cases to come before the federal courts, the government made the argument that to permit a prisoner to be heard on his claims in the District Court would be to "encourage a flood of such petitions." Sewell v. Pegelow, 291 F.2d 196, 198 (4th Cir. 1961). The Court of Appeals rejected that argument, and the rationale for its decision is applicable in the present case:

> "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency." (citation omitted). Id.

See also, Johnson v. Glick, 481 F.2d 1028, 1030 (2nd Cir. 1973). A similar concern about a potential plethora of groundless claims was rejected by the Supreme Court in Monroe v. Pape, supra. See, dissenting opinion at 240 n.68.

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3 An effect of Preiser v. Rodriguez, supra, will be to substantially reduce the number of constitutional claims by prisoners which may be litigated under 42 U.S.C. § 1983. See, Schneckloth v. Bustamonte, 412 U.S. 218, 260 n.14, 93 S.Ct. 2041, 2065 (1973) (concurring opinion).

Although the federal courts must maintain a respect for state institutions, the concept of federalism may not be permitted to shield an invasion by state officials of a citizen's constitutional rights. Jordan v. Hutcheson, 323 F.2d 597, 601 (4th Cir. 1963). The Supreme Court has held that federal courts have a duty to enforce the constitutional rights of all persons including prisoners. Cruz v. Beto, 405 U.S. 319, 321, 92 S.Ct. 1079, 1081 (1972) (per curiam).

> Prison officials are encouraged to continue to make progress towards improvement of prison conditions. State courts, it is to be hoped, will join in such encouragement, but if a case comes to this court demonstrating constitutional violations it is the duty of this court to face the issue rather than pass the issue back to a state court or a state prison administrator. (citation omitted). Exhaustion of the plaintiff and of state remedies is not required under 42 U.S.C. § 1983. Castor v. Mitchell, 355 F. Supp. 123, 125-26 (W.D. N.C. 1973).

See also, Kersh v. Bounds, 364 F. Supp. 590, 592 (W.D. N.C. 1972); Delorme v. Pierce Freightlines, Co., 353 F. Supp. 258, 260 (D. Ore. 1973).

The Supreme Court has recognized its own limitations in establishing the powers and duties of the federal judiciary and has consistently held that decisions concerning matters of fundamental policy are for Congress, not the Court, to make. See, e.g., Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099 (1972). Congress has responded with new laws when it deemed such legislation was necessary. For example, in light of Fay v. Noia, 372 U.S. 391 (1963), Congress rewrote 28 U.S.C. §§ 2254 and 2255 to provide guidance to the federal courts in habeas corpus proceedings. Similarly, Congress has legislated exhaustion of remedies requirements in other areas; e.g., the collection of state taxes (28 U.S.C. § 1341) and state utility rate orders (28 U.S.C. § 1342). See

also, Love v. Pullman Company, 404 U.S. 522, 92 S.Ct. 616 (1972). On the other hand, Congress has not enacted an exhaustion requirement for 42 U.S.C. § 1983. Its inaction is consistent with this Court's holding in Monroe v. Pape that Congress did not intend there to be an exhaustion requirement in such cases.

II. THE DECISIONS BELOW IN BURRELL V. McCRAY AND SMITH V. McCRAY ARE CLEARLY CORRECT AND PRESENT ISSUES WHICH DEPEND UPON THE FACTS OF THESE CASES AND ARE OF IMPORTANCE ONLY TO THE IMMEDIATE PARTIES.

The Court of Appeals reached the merits in Burrell v. McCray and Smith v. McCray and held that Petitioners violated McCray's Eighth Amendment right to be free from cruel and unusual punishment when they subjected him to isolated confinement in "strip cells" for periods of two days. The important facts were stated by the Court of Appeals as follows (see also, 367 F. Supp. at 1210 et seq.):

A. No. 74-1043-McCray v. Smith

> On or about November 20, 1971, McCray was moved from his regular cell because of his complaints about unsanitary conditions. Sergeant Smith, who had never met McCray before, ordered his removal, had him showered and deloused and placed him in another cell on a different tier. The warden instructed Smith to provide McCray with his law books and legal materials which were kept in his regular cell. When they were not provided to him at once, McCray began a substantial vocal disturbance. Additionally, the screaming McCray tore a locker off the cell wall and banged it repeatedly against the wall.
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> Sergeant Smith determined that McCray should be removed from this cell and placed in the isolated confinement (I.C.) area, cell No. 5. As found by the district court, "this measure was taken to avoid the possibility of causing a greater disturbance among the other inmates." 367 F.Supp. at 1211. While McCray was being removed, again, as found by the district court, he "began shouting insults and threatening to do bodily harm to himself." Id. Smith, treating these threats as an indication of mental and emotional instability, directed that McCray be placed in isolated confinement without any clothes or bedding. This was done to protect McCray from harming himself.
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> McCray was placed nude in the cell about 11:30 a.m., November 20. The cell, itself, was quite long and narrow with a high ceiling. The walls, ceiling and floor were all concrete and there was a one-foot high concrete slab,

six to eight feet long and three feet wide, which was McCray's bed. Although, initially, McCray was furnished no blankets or other bedding, during the night a prison guard gave him a mattress. McCray testified that it was so cold that he tore open the mattress, which was old and deteriorated, and dug a channel down in the cotton so that he could sleep nestled in the mattress. Subsequently, McCray was disciplined for destroying the mattress.

The cell contained a toilet and a sink. The record does not show whether the cell had a window, but evidence was offered that there was a light bulb recessed in the rear wall. The cell had two doors-the inner one composed of bars, and the outer one made of solid wood but not closed. McCray was given no materials with which to clean himself or the cell, and he was fed in plastic cups. He was deprived of reading and writing materials.

The next morning Sergeant Smith returned to check on McCray and found that he had defecated into a cup and smeared feces over himself and the cell wall. Accordingly Smith decided not to return him to his former cell. Instead, he had McCray bathed and the cell scrubbed, and then returned McCray to I.C. cell No. 5 for another twenty-four hours. It was not until that time that Smith caused notice to be given to a psychologist or psychiatrist in accordance with the applicable written administrative directive which had become effective August 10, 1970. The directive stated that "an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified . . ." and directed that the "psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period." (Emphasis added.) By its terms, the directive permitted the placing of inmates displaying mentally disturbed behavior in a punitive or isolation cell when the institution lacks a mental observation cell and a psychologist or a psychiatrist approves the lodging of such an inmate in an isolation cell.

The next day, November 22, McCray, according to Smith, "started acting alright." He was then returned to his regular cell

on the third tier. We infer that McCray's clothes were not returned to him until this time. The record on appeal does not show that he was ever evaluated by a psychologist or a psychiatrist.[2]

2. Sergeant Smith implied that the psychologist, one Dr. Musk, did see McCray. Dr. Musk testified that he could not report whether he had talked to McCray at this time. He said he would "most probably" have recorded such a visit, but often did not.

B. No. 74-1042-McCray v. Burrell

On or about January 1, 1972, McCray was again removed to another cell. A fire broke out in McCray's cell, according to McCray, accidentally, but in the belief of Captain Burrell, by design. In either event, McCray was burned. Not without difficulty, the guards extinguished the fire and conveyed McCray to the dispensary where, despite McCray's resistance, the nurse on duty treated his burns. The nurse suggested that McCray remain in a locked cell in the hospital. At a later date, McCray was disciplined for setting fire to his cell.

Captain Burrell, who was present when McCray was treated, not unreasonably believed that McCray had set the fire. Since he concluded that McCray was mentally unstable, he decided, despite the nurse's suggestion, to place McCray in a mental observation (M.O.) cell, again without clothes or a mattress or other bedding. McCray was placed in the M.O. cell at about 9:45 a.m., January 1, and released about 8:00 a.m., January 3. At about the time he was treated in the dispensary, the nurse, purportedly acting in accordance with the written directive to which reference has been made, contacted a physician and informed him that McCray was placed in M.O. The physician told her to communicate with another doctor, whom she was unable to reach, and McCray was not seen by a physician until January 4, 1972.

The M.O. cell in which McCray was placed was described by Captain Burrell as a bare cell. The windows were covered with sheet metal; but the cell had an electric light. The cell had concrete walls, a concrete ceiling, and a tile floor. There was no sink, and the only sanitary facility was

> an "oriental toilet"-a hole in the floor, six to eight inches across, covered by a removable metal grate which was encrusted with the excrement of previous occupants. The "toilet" flushed automatically once every three to five minutes. McCray was not permitted to bathe, shave or have or use articles of personal hygiene, including toilet paper. He was not afforded reading or writing materials. He claimed that during the forty-six hours he spent in this confinement "it was impossible to sleep . . . I stood up most of that [first] night, the floor was cold." 516 F.2d at 365-67.

In McCray's suit against Smith, the Court of Appeals stated that "[t]he conditions of confinement in I.C. cell No. 5 came perilously close to a denial of eighth amendment rights in and of themselves, but the record is not sufficiently complete that we rest our decision on this ground." Id. at 368. The holding of the Court was that although a prisoner, who exhibits a mental condition which suggests that he may harm himself or others, may be removed from the general population and subjected to protective measures, the confinement of McCray, naked, in isolation, for two days, without any immediate effort by Smith to obtain a prompt medical evaluation and necessary treatment for McCray, violated his Eighth Amendment rights. Id. at 368-69. While recognizing that the isolation of a prisoner for his own protection and the safety of the prison may be a rational means to reach a permissable end, the confinement of McCray,under the conditions and for the length of time in this case, without securing medical attention for him, was arbitrary, unreasonable and unnecessary. See, Id. at 368 n.3.

In McCray's action against Burrell, the Court of Appeals found two violations of the Eighth Amendment: "First, the record reveals that the conditions of confinement in the mental observation (M.O.) cells in which McCray was kept fall far short of the current standards of decency of present-day society." Id. at 369. Second, even assuming that the conditions of isolated

confinement did not constitute a per se violation of the Eighth Amendment, the deprivations, discomforts and suffering resulting from such confinement should have been alleviated, and less barbarous means of protection should have been provided by Burrell. Id. The failure of Burrell, upon learning that expert medical help was not forthcoming for McCray within a reasonable period of time, to devise and employ means to protect McCray from injuring himself other than by continued isolation while being deprived of clothing and elements of personal hygiene, violated McCray's right to be free from cruel and unusual punishment.

The Court of Appeals' decisions in McCray's actions against Smith and Burrell were clearly correct. Petitioners claim that the Court erred by refusing to accept the District Court's findings of fact. The Court of Appeals, however, specifically stated that, "[t]he district court made extensive findings of fact, resolving questions of credibility, and we accept those findings. We disagree, however, with the legal conclusions to be drawn therefrom." Id. at 365. See also, Id. at 367.

Petitioners also claim that the decision of the Fourth Circuit rests on a finding that "it did not like isolated confinement rather than on a finding that the Eighth Amendment prohibits such isolated confinement." Petition for a Writ of Certiorari, page 24. The Court's decision, however, is supported by numerous other lower federal court decisions which have held that isolated confinement under certain circumstances is unconstitutional. See, McCray v. Burrell, supra at n.3 and n.4. See also, McCray v. Sullivan, 509 F.2d 1332, 1336 (5th Cir. 1975) ("...the common element in cases finding a violation of the Eighth Amendment is the deprivation of the basic elements of hygiene."); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordan v. Fitzharris,

257 F. Supp. 674 (N.D. Cal. 1966); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), modified, 456 F.2d 835 (5th Cir. 1972); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969). See also, Wheeler v. Glass, 473 F.2d 983 (7th Cir. 1973).

This Court should not review issues which are of interest and importance only to the immediate parties and which affect few persons other than the litigants. The decisions below in the McCray cases present such issues. The decisions turn upon their own unique facts, and it is unlikely that the issues will recur.

On January 23, 1974, Maryland state officials ordered that use of the mental observation unit (the "blue room"), in which McCray was confined by Burrell, be discontinued. The Morning Sun and The Evening Sun, Baltimore, January 24, 1974. The unit has not been reopened. Furthermore, Maryland Division of Correction Commissioner James Jordan was quoted as stating that prisoners "will not be stripped or housed in bare cells." Id. Robert J. Lally, secretary of the Maryland Department of Public Safety and Correctional Services, said that under no circumstances "will inmates be returned to the blue room." Id.

Maryland prison officials have also taken action to assure that Penitentiary prisoners will not be subjected to the mistreatment which McCray suffered as a result of being confined by Smith in the isolated confinement cells. In addition to the "administrative directive" which was referred to by the Court of Appeals in its opinion,and which has been reissued as Maryland Division of Correction Regulation No. 110-4, the Division also now requires that a record will be maintained on Division of Correction Form 110-1R of all inmates placed in isolation cells. The form provides a log of the dates and times when psychologists, psychiatrists or other professional staff members visit prisoners in isolation.

The Court of Appeals was clearly correct in determining that McCray's Eighth Amendment rights were violated when he was confined in the mental observation cell by Burrell and in the isolated confinement cell by Smith under the circumstances of these cases. The Court properly remanded the cases to the District Court to provide Smith and Burrell with the opportunity to prove a qualified immunity and good faith defense.

The Supreme Court has granted certiorari in several recent cases to review prison practices and regulations. See, Procunier v. Martinez, 416 U.S. 39[illegible] (1974); Wolff v. McDonnell, 418 U.S. 539 (1974); Preiser v. Newkirk, __U.S.__, 95 S.Ct. 2313 (1975); Montanye v. Haymes, 508 F.2d 837 (2nd Cir. 1975), cert. granted, 43 L.W. 3681 (6/30/75). All of these cases concerned unresolved questions of fundamental importance in the overall administration of state prison systems throughout the country . By comparison, the McCray cases arose as the result of the conduct of individual guards in a unique factual situation. The cases do not present issues which are of sufficient importance to warrant review by this Court.

CONCLUSION

For the foregoing reasons, this cause should not be reviewed by this Court, and the petition for a writ of certiorari should be denied.

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